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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

HAROLD WAYNE HOLOMAN, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Anderson County
No. 12-17-00364-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Harold Wayne Holoman.

* The trial judge was Hon. Pam Fletcher, 349th Judicial District Court, Anderson County Courthouse, 500 N. Church Street, Rm. 30, Palestine, Texas 75801.

* Counsel for Appellant at trial was Scott Nicholson, 901 N. Perry Street, Palestine, Texas 75801.

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No. PD-1339-18

TO THE COURT OF CRIMINAL APPEALS

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HAROLD WAYNE HOLOMAN, Appellant

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Ordinarily, the recidivist family-violence enhancement is a guilt-phase issue because it is jurisdictional—that is, it must be alleged to vest jurisdiction in the district court. The court of appeals erred by holding that this jurisdictional quality is immutable. As Article 36.01 provides, when the prior conviction is used for enhancement only and not to vest jurisdiction, it is properly treated as a punishment issue.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant argument.

STATEMENT OF THE CASE

Appellant was indicted for third-degree-felony assault by occlusion.[1] The jury convicted Appellant of the lesser-included offense of misdemeanor assault.[2] At punishment before the court, the State offered Appellant's prior family-violence conviction to elevate the misdemeanor to a third-degree felony under the statute at issue—TEX. PENAL CODE § 22.01(b)(2)(A).[3] Based on two additional, sequential felony convictions, Appellant was sentenced to 25 years' confinement.[4]

On appeal, Appellant argued that his prior family-violence conviction was an element of recidivist-family-violence assault and, since the State failed to prove the prior at the guilt phase, he was convicted of only a misdemeanor, rendering his 25-

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[1] CR 6; TEX. PENAL CODE § 22.01(b)(2)(B).

[2] 3 RR 42. In addition to the usual elements of that offense, the jury charge required, as a condition for guilt, that the victim was a member of Appellant's household.

[3] 5 RR 16, 18-19, 20-21.

[4] 5 RR 16, 19, 20-21, 28; TEX. PENAL CODE § 12.42(d).

year prison term an illegal sentence. The court of appeals agreed, reformed the judgment to reflect a conviction for "Class A misdemeanor assault family violence," and remanded for a new punishment hearing.[5]

GROUND FOR REVIEW

> Is a prior conviction for family violence under TEX. PENAL CODE § 22.01(b)(2)(A) always a guilt issue simply because it can be, and often is, used as a jurisdictional element?

STATUTE AT ISSUE

This case involves two subsections of TEX. PENAL CODE § 22.01 that raise misdemeanor assault to a third-degree felony. Subsection (b)(2)(A) requires proof of a prior family-violence conviction; Subsection (b)(2)(B) requires occlusion. Misdemeanor assault by causing bodily injury is a lesser of both, and both require the victim to have a family, household, or dating relationship with the defendant.

§ 22.01 Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

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[5] *Holoman v. State*, No. 12-17-00364-CR, 2018 WL 5797241, at *4 (Tex. App.—Tyler Nov. 5, 2018) (not designated for publication).

. . . .

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

. . . .

(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:

(A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or

(B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth[.][6]

STATEMENT OF FACTS

The State's primary attempt to secure a third-degree-felony conviction was through indictment and prosecution for occlusion assault.[7] The testimony supported this charging decision.[8] Although Appellant also had prior family-violence

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[6] TEX. PENAL CODE § 22.01(a)–(b).

[7] CR 6; TEX. PENAL CODE § 22.01(b)(2)(B).

[8] Appellant and the victim's mother were in a relationship, and the victim was living in the couple's household. One night, they had an argument, and the victim intervened. 3 RR 26. Appellant came toward her, she fell backward, and he got on

convictions, the State did not pursue a third-degree-felony prosecution by that route. Instead, it gave notice it would use the priors for enhancement at the punishment phase.[9]

At trial on occlusion assault, the trial court submitted misdemeanor assault as a lesser-included offense, over an objection by the defense.[10] The jury convicted on the lesser, which, in addition to the usual misdemeanor assault elements, required proof of the victim's status as a household member.[11]

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top of her and started choking her. 3 RR 26-28. The 911 operator agreed the victim had a hard time catching her breath. 2 RR 93. Police photos of the victim's throat showed marks that appeared to be made by hands wrapped around her neck. 2 RR 103.

[9] CR 25 ("State's Amended Notice of Enhancement Paragraphs to be Submitted to Fact Finder at Punishment").

[10] 3 RR 40-41 (jury charge conference), 54-55 (jury charge). The jury charge in the clerk's record is incomplete but was transcribed in full in the reporter's record.

[11] 3 RR 42. The trial court's verdict form called the offense "assault causing bodily injury-family violence." CR 46. Strictly speaking, there is no separate offense that requires all the elements that the jury found. Misdemeanor assault coupled with a family-violence finding under TEX. CODE CRIM. PROC. art. 42.013 is sometimes called "assault family violence," but the additional facts necessary to establish "family violence" are slightly different—*see* TEX. FAM. CODE § 71.004—and the judge, not the jury, makes the finding. *Butler v. State*, 189 S.W.3d 299, 302 (Tex. Crim. App. 2006).

At punishment before the court, the State offered Appellant's family-violence prior as an enhancement to elevate the misdemeanor to a third-degree-felony under the statute at issue—TEX. PENAL CODE § 22.01(b)(2)(A).[12] It further enhanced the sentencing range with two additional, sequential felony convictions, and, after the trial court found the enhancement paragraphs true, Appellant was sentenced to 25 years' confinement.[13]

On appeal, Appellant argued that the family-violence prior was a guilt issue. He contended that, without such guilt-stage proof, the evidence was insufficient for a felony conviction under (b)(2)(A) and his 25-year sentence was illegal. The court of appeals agreed. It observed that in *Oliva v. State*, "the jurisdictional nature of the two prior convictions for felony DWI converted them from punishment issues to elements of the offense."[14]

The State argued in its motion for rehearing that the prior was not jurisdictional in this case because the occlusion-assault allegation vested jurisdiction

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[12] 5 RR 16, 18-19, 20-21.

[13] 5 RR 16, 19, 20-21, 27-28; TEX. PENAL CODE § 12.42(d).

[14] *Holoman*, 2018 WL 5797241, at *3 (citing *Oliva v. State*, 548 S.W.3d 518, 533 (Tex. Crim. App. 2018)).

in the district court. The court of appeals, however, held it "axiomatic" that an aggravating fact must either be an element of the offense or an enhancement issue for punishment—it could not be both.[15] Having failed to prove the element at guilt, the State was left with a conviction for Class A misdemeanor assault family violence. The court of appeals modified the judgment and remanded for a new punishment hearing.

SUMMARY OF THE ARGUMENT

Jurisdictional priors have long been treated as elements of the offense, in large part because of Code of Criminal Procedure Article 36.01. But a jurisdictional prior does not become so because of the abstract language of the statute creating it. It is jurisdictional because of how it is used in a particular case. Where, like here, the prior conviction is used solely for enhancement and is not alleged to vest jurisdiction, it should be a punishment issue. Article 36.01 supports different treatment of the same statute based on its use (sometimes an element, other times a punishment issue), as does the ambiguity of the statute, which does not definitively classify the fact of a prior conviction as either one or the other. And the policy that prior

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[15] *Id*.

convictions should usually be punishment phase issues likewise supports such an approach. The court of appeals erred in interpreting § 22.01(b)(2)(A) to always treat a prior conviction as jurisdictional—even when, in the case at hand, it clearly was not.

ARGUMENT

The prior conviction is ordinarily a guilt issue.

Section 22.01(b)(2)(A) should be treated as a guilt issue when it is alleged as a jurisdictional fact in an indictment. This Court has repeatedly treated such prior conviction allegations as if they were elements.[16] As early as 1969, the Court explained in *Leal v. State* that, when the State alleges prior convictions to charge a felony but fails to prove the priors at the guilt phase, the consequence is that, while the district court still has jurisdiction over any lesser-included base offense, the case

[16] On occasion, the Court acknowledges that while it treats allegations of jurisdictional facts as elements, they are not actually elements in the usual sense. *See Cheney v. State*, 755 S.W.2d 123, 128 (Tex. Crim. App. 1988) ("'Value' under Section 31.03, supra, [theft] is more properly conceptualized as a jurisdictional element rather than an element of the offense itself."). More recently, the Court stated in *Oliva* that an aggravating fact that otherwise would be a punishment issue could become an element because it was jurisdictional. 548 S.W.3d at 533.

is no longer a felony.[17] In various cases spanning the decades thereafter, the prior convictions alleged in felony DWI and theft indictments have been consistently treated as if they were elements.[18] They must be set out in the jury charge like other elements. In *Gant v. State*, the trial court's guilt charge asked for a verdict on all the elements of theft and then submitted Gant's prior conviction as a special issue (within the guilt-phase charge) to be decided only in case they found Gant guilty of theft.[19] This Court held it was error not to include the prior conviction issue within the main charge. While the error was harmless, the Court noted that a "not true" finding on the special issue would constitute an acquittal.[20]

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[17] 445 S.W.2d 750, 752 (Tex. Crim. App. 1969).

[18] *See Diamond v. State*, 530 S.W.2d 586, 587 (Tex. Crim. App. 1975) ("the prior theft convictions in the instant case created a new offense of the grade of felony and vested the District Court with jurisdiction."); *Gibson v. State*, 995 S.W.2d 693, 696 (Tex. Crim. App. 1999) ("[t]he prior intoxication-related offenses are elements of the offense of felony driving while intoxicated. They define the offense as a felony and are admitted into evidence as part of the State's proof of its case-in-chief during the guilt-innocence stage of the trial."); *Martin v. State*, 200 S.W.3d 635, 639 (Tex. Crim. App. 2006) (requiring that the jury in a felony DWI trial be charged on all the elements of the offense, including jurisdictional elements).

[19] 606 S.W.2d 867, 871 (Tex. Crim. App. 1980) (prior theft convictions are jurisdictional elements of the alleged felony and must be included in the body of the main charge).

[20] *Id*. at 872 n.10.

Article 36.01 stands as authority for treating facts alleged for jurisdiction as elements.[21] It provides:

> When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.[22]

This provision authorizes the reading of jurisdictional priors as part of the indictment, and, as *Tamez v. State* explained, "this action implicitly authorizes the proof of the previous convictions in the State's case-in-chief."[23] Given this history, the State agrees that when it alleges a prior family-violence conviction to charge the

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[21] *Ex parte Benson*, 459 S.W.3d 67, 87-88 (Tex. Crim. App. 2015) ("The 'jurisdictional' exception in Article 36.01 appears to be a tacit recognition that prior convictions that raise an offense to felony status are to be treated as elements."); *see also Gant*, 606 S.W.2d at 871 n.9 (Tex. Crim. App. 1980) ("a coincidental reading of Article 36.01(1) and Article 37.07, § 2(a) . . . convinces us that the [prior conviction enhancement provision for felony theft] . . . must therefore be both alleged and charged as such before the jury is authorized to render a general verdict of guilt."); *Hathorne v. State*, 459 S.W.2d 826, 830 (Tex. Crim. App. 1970) ("when a prior conviction or convictions are alleged for enhancement of punishment only and are not jurisdictional, that portion of the indictment or information is not read until the second or penalty state of the trial and the proof thereof is not properly offered until then.").

[22] TEX. CODE CRIM. PROC. art. 36.01(a)(1).

[23] 11 S.W.3d 198, 202 (Tex. Crim. App. 2000).

defendant with a felony under § 22.01(b)(2)(A), it must be proven at guilt.[24]

But not when the prior is alleged only for enhancement and not for jurisdiction.

The prior conviction in this case warrants different treatment because it met both requirements of Article 36.01—it was "alleged for purposes of enhancement only" and was "not jurisdictional." First, it cannot reasonably be questioned that the prior was alleged for enhancement only. Section 22.01(b)(2)(A) is an enhancement provision, not a definition of elements of a free-standing offense. It is not a separately titled offense or introduced by the words "A person commits an offense if . . . ." Its structure—"[a]n offense under Subsection (a)(1) . . . is a felony of the third degree if"—suggests it merely enhances an already fully defined offense. In the typical case (where it is alleged to secure a felony indictment or felony count

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[24] The court of appeals cites a split among other courts on this issue, but only one court has said (b)(2)(A) is a penalty-phase issue in a case where it was used to vest jurisdiction in a felony court. *See State v. Cagle*, 77 S.W.3d 344, 347 n.2 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Although not always well-reasoned, the remaining published cases have held it is a guilt-phase issue, but none have considered whether it remains so when not alleged for jurisdictional purposes. *Reyes v. State*, 314 S.W.3d 74, 81 (Tex. App.—San Antonio 2010, no pet.) (relying on *Calton v. State*, 176 S.W.3d 231 (Tex. Crim. App. 2005), even though that case did not involve a jurisdictional prior); *Luna v. State*, 402 S.W.3d 849, 851 (Tex. App.—Amarillo 2013, no pet.) (same); *Wingfield v. State*, 481 S.W.3d 376, 379 (Tex. App.—Amarillo 2015, pet. ref'd) (essential element of felony offense).

within an indictment) the enhancement is a guilt-phase issue only because it is jurisdictional.[25] This Court's opinions have sometimes classified prior offenses as elements of new offenses (such as "felony DWI" or a particular-degree of theft) and this might arguably be a reason—distinct from jurisdiction—to require proof at guilt.[26] But this appears to be mostly rhetorical and without statutory basis. At any rate, since *Oliva* clarified that a punishment-phase enhancement can change the degree of the offense,[27] even if a statute such as § 22.01(b)(2)(A) creates a new offense (maybe "recidivist-family-violence assault"), the enhancement would not need to be proven entirely in the guilt phase of trial.

Second, the prior was not jurisdictional because it was not alleged to vest jurisdiction in the district court. Jurisdictional priors "raise the level of the offense from a misdemeanor to a felony, which in turn results in vesting jurisdiction of the offense in district court—a court that generally lacks jurisdiction over misdemeanors."[28] Reading "jurisdictional" as referring to priors that have been

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[25] *See Oliva*, 548 S.W.3d at 533.

[26] *See, e.g., Diamond*, 530 S.W.3d at 587.

[27] 548 S.W.3d at 526.

[28] *Oliva*, 548 S.W.3d at 533.

alleged to vest jurisdiction in the district court is the most natural reading of Article 36.01. It is strained to read it, as the court of appeals may have done, to refer to an enhancement provision that functions in the abstract to elevate a misdemeanor to a felony, which typically is what vests jurisdiction in the district court.

While Article 36.01 is directed at circumstances when prior conviction allegations in the indictment should not be read to the jury and, here, the prior was in a separate notice, that will not always be the case. The State could include a prior conviction allegation in the indictment and signal its use for enhancement, such as through the usual terms "and it is further presented that prior to the commission of the charged offense . . . ." Regardless of how the State gives notice, Article 36.01 is statutory authority for how typically-jurisdictional priors should be treated when not used as such.

Application to other prior conviction enhancements.

This same approach should apply beyond § 22.01(b)(2)(A). So when the State alleges intoxication assault or manslaughter, but the jury convicts on the lesser of DWI and the defendant has prior intoxication convictions, the State should be able to rely on TEX. PENAL CODE § 49.09(b) at the punishment phase to enhance the

offense to a felony—despite that these same priors would, under *Ex parte Benson*,[29] clearly be elements if the State had indicted and prosecuted the case as a felony DWI. The same holds true for a prosecution for state-jail-felony-value theft where the jury convicts for a misdemeanor-value theft but the State gives notice at punishment that the defendant has two prior thefts.[30]

One* or *the other, depending on its function, but not both in the same case.

The court of appeals held that an aggravating fact must either be an element of the offense or an enhancement issue for punishment—it could not vary depending on its function in a particular case.[31] But this is inconsistent with Article 36.01, which is phrased in terms of what the prior conviction is alleged for: "When prior

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[29] 459 S.W.3d at 75.

[30] TEX. PENAL CODE § 31.03(e)(4)(A), (D). Although not an issue here because the State gave pretrial notice of its intent to use the family-violence prior for punishment-phase enhancement, such notice is not required until the beginning of the penalty phase. *Pelache v. State*, 324 S.W.3d 568, 577 (Tex. Crim. App. 2010) (when a defendant does not request continuance or allege surprise or that he is unprepared to defend against prior conviction allegations, notice given at beginning of punishment phase satisfies due process and due course of law); *Villescas v. State*, 189 S.W.3d 290, 294 (Tex. Crim. App. 2006) (explaining that notice of enhancement is a constitutional, not statutory, issue).

[31] *Holoman*, 2018 WL 5797241, at *3.

convictions are alleged for purposes of enhancement only and are not jurisdictional . . . .” Neither do the aggravating-fact statutes suggest that this jurisdictional quality is immutable. Many, like § 22.01(b)(2)(A), are ambiguous about whether the prior offenses set out an element or a punishment-phase enhancement,[32] and this may be by design—to enable such flexibility.

The court of appeals’s rule—that an enhancement is forever in one camp or the other—could perhaps be easier for practitioners to implement and remember. But it is not in keeping with the larger purpose of Article 36.01 as explained in *Oliva*:

> Before the enactment of Article 36.01, this Court upheld the practice of allowing prior convictions alleged in the charging instrument to be read to the jury before it decided the issue of guilt. The legislature’s obvious purpose in changing that practice was the “prevention of the extreme prejudice which would inevitably result” in announcing the prior convictions before guilt had been decided.[33]

If Appellant and the court of appeals had their way (*i.e.*, the prior is always a

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[32] The Court in *Oliva* found the DWI enhancement scheme ambiguous on this point. 548 S.W.3d at 522.

[33] *Oliva*, 548 S.W.3d at 529 (citations omitted). This same concern appeared to have dissuaded the prosecutor from offering the prior at the guilt phase. 2 RR 30 (prosecutor explaining in *voir dire* how he wrongly accused his daughter of eating an entire bag of cookies because she had done it before and stating, “So you can’t put [sic] a person’s criminal history against them during the guilt/innocence phase of trial.”)

jurisdictional element), then when the State has two avenues of prosecuting a felony (one with a prior and one without) it will simply prosecute both and the defense will suffer the prejudice of the jury learning about the prior offense on the other case. Under the State's interpretation, it can undercharge (as in this case) and the jury's focus at guilt can be unperturbed by the presence of a prior.

The court of appeals' concern that a prior conviction cannot be both an element and a punishment enhancer was right to one extent.[34] If the State had charged both (b)(2)(A) and (b)(2)(B) as jurisdictional felonies in its indictment and the jury implicitly rejected those aggravating facts in returning a verdict on the lesser, the State would not, in the same case, be able to reuse (b)(2)(A) as a punishment-phase enhancement. Law-of-the-case would prevent such re-litigation of the prior conviction issue. By contrast, what the State advances here is permitted generally for enhancements—that they can be used either as an element or to enhance sentence, but not both in the same case.[35]

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[34] *Holoman*, 2018 WL 5797241, at * 3.

[35] *Wisdom v. State*, 708 S.W.2d 840, 845 (Tex. Crim. App. 1986) ("The use of a prior conviction to prove an essential element of an offense bars the subsequent use of that prior conviction in the same indictment for enhancement purposes."); *Kincheloe v. State*, 553 S.W.2d 364, 367 (Tex. Crim. App. 1977) (use of same felony

Why the case cannot be resolved on harm.

Error in submitting an issue at the wrong phase of trial can frequently be harmless, particularly when the same factfinder is involved. But here, if the prior is always an element, the trial court would not have jurisdiction to enter judgment on an offense under § 22.01(b)(2)(A) since it is not a lesser-included offense of occlusion assault nor was it separately charged in the indictment.[36]

Conclusion

The allegation of occlusion assault under subsection (b)(2)(B) vested jurisdiction in the district court over that offense and any lessers.[37] The State's allegation of the prior conviction, by contrast, was for enhancement purposes. It was in a separate enhancement notice that could not have vested jurisdiction in the district

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as an element in primary offense and as an element of enhancement offense—but not enhancement itself—did not violate rule; basis for enhancement use was the conviction, not its elements).

[36] *See* TEX. CODE CRIM. PROC. art. 37.09(1); *Lomax v. State*, 233 S.W.3d 302, 311 (Tex. Crim. App. 2007) (finding felony DWI not a lesser of intoxication manslaughter because it requires facts—two prior DWI convictions—that intoxication manslaughter does not).

[37] TEX. CODE CRIM. PROC. art. 4.06.

court. It was thus properly a punishment issue under Article 36.01 and the court of appeals erred to hold otherwise.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals, and affirm the trial court's judgment and sentence for third-degree-felony assault.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 3,486 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 12th day of April 2019, the State's Brief on the Merits was served electronically on the parties below.

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